UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAHAINA-MAUI CORPORATION,
California corporation,

Appellant,

v.

No. 20419

EPH TAU TET HEW and HELEN
ONA HEW, husband and wife,
RGE TAN and SHIZUKO RUTH
, husband and wife,

Appellees.

APPELLANT'S REPLY BRIEF

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_____/

APPELLANT'S REPLY BRIEF

STATEMENT OF FACTS

Appellees entered into an option to lease land to pellants; upon exercise of that option Appellees refused to rform and brought this action to cancel the option. The urt below granted a summary judgment to Appellees.

The sole question before this court is whether that mmary judgment can stand. The court must therefore determine, ong other things, whether there was any genuine issue of

terial fact between the parties, and in making such a determination
ne "Statement of Facts" given by the parties is of singular
portance. Appellees' "Facts" contain references to self-serving
atements made by the Appellees which are nowhere acceded in
Appellant.[1/] Some of their "facts" are immaterial to a decision
a summary judgment[2/] and serve only to confuse the facts which
e open to consideration. Two statements, one of which is not
fact at all and the other an incorrect statement of the lower
urt's holding, deserve specific mention since they might otherwise
misleading to this court:

> Appellees make the statement at page 3 of their brief: "A proper subordination provision in the lease was basic and essential to enable the Appellant to obtain for the benefit of both lessor and lessee the proper financing for a proposed 2-3 story, 200 unit 'combination apartment hotel' project costing between

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"Appellees, not experienced in the leasing of real property
:92)" (Appellees' Brief 2-3); "Appellees understood that this
ant prevented, during the term of the 'exclusive option,' the
pellees from negotiating a lease with any other person (R:84)"
ppellee's Brief 2-3)

See footnote 1 above. Additional examples: "were not represented
counsel (R:80)" (Appellee's Brief 3); second full paragraph,
ge 4.

$1,000,000.00 and $1,500,000.00." At no point in any of the references given by Appellees is there any indication whatever that the subordination was to be for the "benefit of both lessor and lessee"; nor is there any portion of the record that would permit the inference that this statement is fact at all. It is rather the assertion by Appellees of a legal conclusion on which the outcome of this case in large measure depends.

Appellees state at pages 2 and 6 of their brief that the court below ruled "that no contract to lease had been entered into because of the uncertainty and indefiniteness of its essential and material terms." The lower court made no such ruling; it found "indefiniteness" in the subordination provision of the option (R:105,115), but it at no time found that this meant there was "no contract to lease." This conclusion is one which Appellees urged on the court below - without success - and urge upon this court. It is a position they take, but it is not a fact. It should also be noted that Appellees use the plural "terms" in describing the indefiniteness found by the court below; the court was quite specific in finding indefiniteness in only one term - the subordination clause. (R:105,115).

Appellees make a further reference to what the court below did at page 10 of their brief; they say the court below concluded that as a matter of law the alleged option was insufficient under the Statute of Frauds." If they mean that the court specifically came to such a conclusion, their statement is simply untrue. If they mean that such a conclusion must necessarily follow from the court's decision, the statement is merely misleading in that it indicates the court below supported the argument they are introducing. The court below did not mention the Statute of Frauds in its holding.

ARGUMENT

Appellees' arguments tend at times to go in many rections and to be not clearly related to the issues in this se. To avoid confusion Appellant will reply to these arguments thin the framework of the issues presented. These are not mplicated. The case concerns an option to lease land belonging Appellees which Appellant has exercised. Appellees have fused to perform and have been awarded a summary judgment in eir action to declare the option void. The award of this mmary judgment is being appealed here by Appellant.

The District Court ruled that the option was, in all spects save only one, specifically enforceable under Hawaii w by virtue of the case of Francone v. McClay, 41 Haw. 72 (1955), case granting specific enforcement of an option to lease almost entical to the one here. There is, however, one clause in our tion which did not appear in that case, it being the underlined rtion of the following paragraph:

> Said lease shall contain the standard provisions normally contained in a lease for similar property situate in the State of Hawaii together with the provision that the lessors shall subordinate their

fee to permit the lessee to obtain financing

which provision is by way of example, but not by

way of limitation.

his is the only respect in which the case at hand differs from rancone, but the court below ruled that the subordination rovision was too indefinite for specific enforcement as a matter f law and that therefor Appellant was not entitled to specific nforcement of any part of its contract nor to damages for its reach. Further, the court ruled that as a matter of law Appellant ould not waive the benefit to which it was entitled under the ubordination clause, and thereby obtain enforcement of the emainder of the contract. The entire case before this court thus nvolves the one provision underlined above and nothing more. here are three issues:

1) Is the underlined provision "indefinite" such that it cannot be specifically enforceable? 3/

/ Appellees at page 16 state their position as being "that on he motion for summary judgment the court below had only to consider f there was a genuine issue of material fact on whether the sub-rdination clause tendered by Appellant (or any subordination clause) as or could be a standard provision 'normally contained in a lease or similar property situate in the State of Hawaii.'" This, of ourse, is clearly wrong; the question is whether the subordination lause in the option was sufficiently definite for specific enforce-ent. It can be definite in itself (which has always been ppellant's contention), or if not definite in itself, it can evertheless attain sufficient definiteness by reference to some xternal standard such as "standard provisions" (which has never been ppellant's position). See Restatement Contracts §370, Comment C. erhaps Appellees' misunderstanding of the issues explains the eeming lack of organization in their brief.

2) Even if the provision should be found to be not specifically enforceable because "indefinite," can it not be waived by the Appellant, thereby leaving the balance of the option specifically enforceable under the rule of Francone v. McClay?

3) Even if the option is incapable of specific performance under any circumstance, is not Appellant still entitled to an award of damages because of Appellees' refusal to perform?

I. As to the first issue (i.e., Is the provision which stinguishes this option from the one in the Francone case too lefinite for specific performance), Appellant showed in detail l at length at pages 11 through 17 of its brief that the provision ing for subordination is perfectly clear, perfectly simple and no wise indefinite. Appellant further showed that a ruling at such clause was indefinite would constitute a judicial inter- ence with freedom to contract which was contrary to all existing thorities and accepted jurisprudence of the common law. Appellees et this argument with many argument headings and many pages of rds and, when the smoke clears, only two arguments. These are:

(a) The underlined language, say the Appellees, means "that a provision subordinating the fee would be included in the lease along with other nonstandard provisions not mentioned and yet to be negotiated."

(Appellees' Brief 9).

(b) The subordination language is indefinite and unenforceable because "necessary elements of a subordination clause are omitted, such as the maximum amount of the construction loan, the terms of the loan including when the loan would become due, the rate of interest it would bear and the manner in which the loan would be paid." (Appellees' Brief 9)

These will be discussed seriatim:

(A) Appellees' argument that other nonstandard provisions re intended to be included in the lease is to Appellant's knowledge and new in this case. It was not mentioned insofar as can be called in oral argument nor raised in any of the memoranda led below. Certainly the interpretation was never adopted, even liquely, by the court below and Appellees apparently wish this urt to affirm the grant of summary judgment below based upon this v and independent ground. Appellees state that this interpretation the "obvious meaning" of the provision in question,[4/] but they e surely not serious. The asked-for interpretation is anything t obvious; it is strained and unreal. Further, this "interpretation" ies in the face of the use of "together with" in the provision:

They do not explain why, if it is obvious, no one thought out it before.

> Said lease shall contain the standard provisions normally contained in a lease for similar property situate in the State of Hawaii <u>together with</u> the provision that the Lessor shall subordinate their fee to permit the Lessee to obtain financing which provision is by way of example, but not by way of limitation. (R:9)

e last clause - "which provision is by way of example, but not way of limitation" - clearly refers to the "provision" which ecedes it. And that provision is definitely stated to be the e exception to the proviso that the lease shall contain "standard ovisions." Nowhere is there any use of the plural or indication at more than the one specified "non-standard" provision was tended. Surely Appellee's "interpretation" would never be adopted any court merely from a reading of the words; rather its eptance would require a rather strong showing by parole evidence at this was the intention <u>despite</u> the words. But in order to evail on a motion for summary judgment as here, it must be found this court that the meaning of the words is so clear that parole idence <u>would not be admitted</u> to explain it. Such a finding h respect to this "interpretation" is simply not reasonable. 5/

5/ Even if the interpretation asked for by Appellant is valid, rely the provision does no more than give the parties permission arrange other nonstandard provisions later if they wished to. such case it is merely redundant, for the parties may always end or add to their contract later by mutual agreement.

(B) Appellees present a number of argument headings on
ie question of specific enforceability of the provision, but they
.l contain the same argument. One of these headings states that
ie option was insufficient under the Statute of Frauds because
'he subordination language was vague and indefinite." (Appellee's
'ief 10). Another is that "an option to lease which is incomplete
d uncertain cannot be specifically performed." (Appellees' Brief 13)
pellees do not indicate anything that is "incomplete and uncertain"
out this option other than the alleged indefinitness of the
bordination provision. Again: "as a matter of law, a subordination
ovision requires agreement on the conditions of the subordination."
ppellees' Brief 17) These conditions, it turns out, are the
ecessary elements" which were not included in this case and
ereby render the subordination clause indefinite (Appellees'
'ief 9,18). In short, all these headings introduce precisely
ie same argument -- that the subordination language is uncertain.
this is the appropriate issue, then it ought to be discussed
such and not obscured behind a number of confusing disguises.

The provision "that the lessor shall subordinate their
e to permit the lessee to obtain financing" surely is not
definite on its face. It describes fully and completely what
ie lessor is required to do. [6/] Appellees argue, however, and the

[6/] As Appellant pointed out in its opening brief (page 13), it offered
o supply experts to establish that the provision had a definite and
scertainable meaning as it stood. Appellees recognized in their
'ief that "this amounted to an offer of proof of facts which precluded
ie entry of summary judgment." (Appellees' Brief 18)

wer court apparently agreed, that any subordination clause in der to be effective as an agreement between two parties must ntain "necessary elements" including the maximum amount of the nstruction loan, the terms of the loan, including when the loan uld become due, the rate of interest it would bear, and the manner which the loan would be paid. But there is no explanation of why se elements must be present, and no hint as to why a party cannot, he wishes, simply agree to subordinate his fee to whatever tent may be necessary in order for the lessee to obtain financing. Appellant points out at pages 15 and 16 of its brief, there is difference except in degree between an agreement to subordinate mpletely as here, or subject to any combination of restrictions ecessary elements"), or not at all. It is truly an unusual rule law which (1) permits a party who agreed to fully subordinate his terest in a piece of property, simply because of that agreement, avoid not only his obligation to subordinate but also all other ligations he might have incurred at the same time,[7/] but (2) requires party who agreed to a less-than-full subordination to comply in ll with all his obligations. Appellant is unable to find one

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Even though he may have received full compensation and the other rty was always prepared to perform in full. In this case Appellant id Appellees the sum of $1,000 for the option which had a life of ly slightly in excess of three months (R:8-9); Appellant is also epared to show at trial that the rental agreed to by Appellant s in excess of the value the land should have brought under a gular lease when the option was entered into.

ngle logical justification for this rule suggested by Appellees. e justification given by Appellees is as follows: They say) Appellant's contention that the provision is clear and definite "absurd"; and (2) that Appellant can only be correct if the bordination provision was one of the "'standard' clauses ntracted for." (Appellees' Brief 18) The first statement is not pported by further discussion or elaboration. The second atement is simply nonsense. No contention has ever been made at the subordination provision is a "standard" clause; the con- ntion is simply that as it is written it is clear, definite and forceable.[8/] A search of Appellees' brief for any further asoning to support the conclusion it asks for or to answer pellant's argument will be in vain.

Appellees simply rest their case upon a series of lifornia cases, none of which was decided by that state's preme Court. These cases are laid out and discussed by Appellees pages 20 through 27 and do unquestionably assert that the -called "necessary elements" asked for by Appellees must be ated in full detail alongside any subordination provision in der to render that provision specifically enforceable in California. at is their reasoning? What logic have they found that neither pellees or Appellant in this case are able to find? The answer

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8/ See footnote 3, supra.

: none. These cases constitute authority for the instant case
hich is governed by Hawaii law) only insofar as they are persuasive;
ey are not only unpersuasive, they are wholly devoid of any
gical explanation for the rule they espouse. As Appellant pointed
t at page 16 of its brief, all of the cases cited by Appellees
rely follow without reasoning or explanation the equally unreasoned
iter dictum in Gould v. Callan, 127 Cal.App. 2d 1, 273 P.2d 93
954) which they incorrectly refer to as the "holding" of that
se. As Appellant has indicated (Appellant's Brief 16-17) the
cision in these cases constitutes a substantial and a unique
terference with the rights of parties to a contract to bargain and
ree to what they will. Such an action cannot be justified by
ference to principles of the common law since it is contrary to
em, and in fact the decisions are purely and simply policy
cisions to the effect that unrestricted agreements to subordinate
ll not be enforced. Only one possible explanation can be found.
California the legislature has decided that purchasers of land
ving purchase money mortgages as a part of the purchase price
y not be held personally liable for the payment of such
rtgages.[9/] In other words, a seller of land is prohibited by law
om bargaining for and obtaining the personal liability of his

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California Civil Procedure Code §580(b).

rchaser and can have no security for payment of the balance his purchase price other than the land. In Hawaii, as in most other [10]/ ates, a seller can bargain for, if he wishes, both the personal ability of the purchaser and the land as his security; he could, he were willing to rely on the personal liability, allow a mplete subordination of his interest in the land - or indeed mply take no mortgage on the land - and not be left without some [11]/ surance of repayment. In California, if the seller agrees to a mplete subordination, the law forces him into a position where has given up all security. Perhaps this unique situation stifies the extremely unusual position taken by the California [12]/ wer appellate courts, but it seems more likely that the Supreme urt of California will refuse to adopt the position when the portunity presents itself. The important point here, however,

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/ E.g., Wodehouse v. Hawaiian Trust Co., 32 Haw. 835 (1933).

/ Surely no one would ever assert that a seller of land would not bound by an agreement to sell land for cash plus a promissory note t no mortgage at all. An opposite result should not follow from situation in which the seller takes cash plus a note plus a rtgage, but agrees to subordinate his mortgage. The latter sition is not legally different from the former.

/ One case outside California has been decided to this same fect in a trial court in New York State. Krusky v. Berger, 225 Y.S. 2d 797 (S.Ct. 1962), aff'd without opinion, 249 N.Y.S. 2d 8 (App.Div. 1964). It offered no reasoning or analysis, wever, and merely adopted blindly the holding of these California ses.

; that these cases are wholly unsupportable unless on the ground
iat they produce a special rule to meet a special situation. This
)ecial situation does not exist in Hawaii where personal liability
1 purchase money mortgages is the rule, and the cases offer no
:her persuasive justification for their use as authority to determine
iwaii law. In short, Appellees' brief merely reiterates these
ises and repeats their holding. It does not, and the cases
) not, meet the arguments made by Appellant at pages 11 through
7 in its brief.

II. The second issue is whether the subordination pro-
ision cannot be waived by Appelant, even though it itself may not
e specifically enforceable, thereby leaving the balance of the
)tion specifically enforceable under the rule of Francone v. McClay.
)pellant, in its brief (pp. 18-32) cited and quoted from numerous
ithorities in a large variety of jurisdictions establishing the
ile that a provision in a contract may be waived by the party
ititled to the benefit thereof thereby entitling him to specific
iforcement of the balance of the contract. Many of these cases
re elaborately and carefully reasoned; all of them involve a
)ntractual provision which could not be specifically enforced
)r one reason or another and the courts granted specific performance
: the balance of the contract. Every one of these cases constitutes

distinguishable authority for Appellant's contention that waiver of e subordination clause in this case was perfectly proper and that ecific performance of the balance of the contract should have been anted. Appellees' brief does contain a discussion of these cases, ough its thrust is not always clear. For example, a name is at- ched to a group of Appellant's cases, ("Waiver of Performance ses"), and then they are distinguished from our case on the follow- g ground: the contracts involved in these cases are "valid, binding d certain in all their terms, the only problem being whether the rms are specifically enforceable or whether equity is the proper medy." (Appellee's Brief 34). It is by no means clear why this con- itutes a distinction and Appellees do not elucidate.[13/] These ses segregated by Appellees simply involve a provision which is t specifically enforceable for a reason other than that it is definite. But this is a distinction without a difference for ere is no material difference between provisions which are not ecifically enforceable because they are indefinite and provis- ns which are not enforceable for any other reason. The import- t factor is that in each case there was a provision which

13/ Probably Appellees do no more here than reiterate the same gument they make over and over - that our case is different cause, somehow, we have no contract.

ıld not be spe ically enforced and in each case the
ıtract was sp ically enforced without that provision. This
precisely w the court should have done in this case. It
perhaps appropriate to note that Appellees' "distinction" has not
en adopted by any of the other courts which have considered
matter; there are a large number of cases cited by Appellant
which a provision was not specifically enforceable because
lefinite yet the balance of the contract was specifically enforced.

Appellees then form another group of the cases cited
Appellant and attach a name to them (The Deferred Payment
es"). They state that "in all the deferred payment cases the
.ver was either made within the time period allowed in the
ıtract or the contract was silent as to time." (Appellees'
.ef 34) It is by no means clear what this statement means or
it was inserted. It cannot mean that there was a "time period
.owed" for waiver in any of these cases, for there was no
h thing. Appellant cannot find any content in the words "contract
silent as to time" in this context. One might guess, from
ıding that portion of Appellees' brief following the statement
ıt what was really meant was that in the cases cited the waiver
taken place before the time for exercise of the option or
eptance of the contract or that there was no such time specified.

rtainly Appellees appear to give this impression when they point that waiver was only offered in this case when it got to trial d "no case has been cited or discovered when a court has allowed waiver of an essential term at such a time." (Appellees' Brief 35) t Appellees could not really have meant that either, for it is t true. In Trotter v. Lewis, 185 Md. 528, 45 A. 2d 329 (1946), option case, the offer to waive the unenforceable term was made in en court. In Levine v. LaFayette Building Corp., 103 N.J. Eq. 121, 2 Atl. 441 (1928), the offer to waive was apparently made in the eadings. In Haire v. Patterson, 63 Wash. 2d 282, 386 P.2d 953 963), the waiver was not made until the termination of the case en the court granted specific enforcement conditioned upon the aintiff waiving his benefits under the indefinite provision. bbell v. Ward, 40 Wash. 2d 779. 246 P.2d 468 (1952), is the same this respect as Haire. Appellees also say, with respect to the eferred payment cases" that "with one possible exception, the ovisions of the contracts involved in the deferred payment cases rmitted, either expressly or by implication, the cash payment of the lance of the purchase price and the courts were not in the position having to change the terms of the agreement involved." (Appellees' ief 38) This statement simply does not give an accurate

scription of the cases. Three of them - one-half of the total der discussion - contain no prepayment provision.[14] These three ses were credit sales and the courts did change the terms in der to grant specific performance.[15] Further, Appellees on the ne page state (at footnote 1) with respect to the exception they cognized, "The New Jersey rule is clear, however, that a belated iver in open court as attempted in the instant case would not be lerated. 142 Atl. at 449." The cited page says nothing of the rt.

Appellees state at page 33 of their brief that if this se involved a subordination clause "with the terms... definitely set rth," and if Appellees were unable to perform, then Appellant uld waive the subordination provision and obtain specific perform- ce. There is no difference between this supposed case and the medy sought by Appellant here in terms of outcome, in terms of irness or justice to the Appellees, in terms of justice to Appelant,

/ Blanton v. Williams, 209 Ga. 16, 70 S.E.2d 461 (1952); Levine v. LaFayette Building Corp., 103 N.J. Eq. 121, 142 Atl. 441 (1928); Trotter v. Lewis, 185 Md. 528, 45 A.2d 329 (1946)

/ The authorities have long recognized that such cases as these d the "waiver of performance" cases do involve the specific per- rmance of a contract different from that agreed upon by the parties. statement Contracts §359(2); Note, Specific Performance with Abate- nt of Purchase Price, 25 Harv. L. Rev. 731 (1912).

in any other terms. The only difference is that in one case the ellees cannot perform and in the other they will not; there is reason in law or logic why this should alter the outcome so far as ellant is concerned. It is submitted that there is no legally nizable difference between the two cases and that Appellees' ission is an admission that Appellant is entitled to prevail here.

Appellees cite two cases of their own with respect to the piety of waiver. One of them, Roven v. Miller, 168 Cal. Ap. 2d , 335 P.2d 391, 335 P.2d 1035 (1959), simply involved an option ch expired before it was exercised. This case has no relevance tever to the question before the court and there is no apparent son for its having been cited. Neither of the parties to this e has been able to find a case from a federal court or from the hest court of any state involving an attempted waiver of a ordination clause. Only one case could be located, and it was m the California District Court of Appeals. In this case, Magna elopment Company v. Reed, 228 Cal. App.2d 230, 39 Cal. Rptr. 284 64), the court refused to accept the waiver on the ground that do so "would be allowing the unilateral creation of a new, ferent contract."[16/] The court had previously held that the sub- ination provision was indefinite. This previous holding was not soned or elaborated but rather was based upon blind adherence

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See note 15, supra.

the pre-existing California District Court of Appeals cases ready discussed. The court's holding that waiver could not be rmitted was equally unreasoned. The court made no effort to explain y permitting such a waiver would make a "new, different contract". ither was there citation of any of the other waiver cases or dis- ssion of the reason why the case before the court should be cided differently from them. It is the only case found by pellees to support them in resisting waiver of the subordination ovision in this case and it is directly contrary to the very sub- antial body of cases from the highest Appellate Courts of numerous risdictions cited by Appellant (Appellant's Brief 18-32). There is way that this case can be squared with them; either it is wrong, all the others are wrong. Appellant submits that the others ate a true and established rule of equity jurisprudence which has thstood the test of time, that they are inherently more logical, d that they are reasoned and reflective of the basic aims of the mmon law including that of effectuation of contracts wherever ssible.

Appellees also make an argument which seems to say that nce there were no restrictions placed upon the agreement to bordinate, the Appellant has never been bound to accept a lease ich did contain such restrictions and thus there is no mutuality remedy. The result of this apparently is that the Appellant's

ercise of the option to lease did not become a bilateral contract. ppellee's Brief 35, 36). The meaning is not altogether clear, but rhaps this is simply another reiteration of Appellees' argument the effect that our case is different from the others because have no contract. The argument simply assumes its own validity prove the validity of its conclusion - i.e., specific performance nnot be granted because there is no contract, and the proof that ere is no contract is that specific performance will not be anted. It is purely circular.

Finally, Appellees at page 36 of their Brief reach the issue raised by the lower court's decision: Is this case fferent from all the other waiver cases because they involved visions solely for the benefit of one party (who was waiving) our case involves a provision for the benefit of both parties. re is, as Appellant pointed out in its opening brief (p. 29) no h thing as a clause in a contract which can never be to the efit of both parties. The question that must be faced if this e is to be distinguished from all the others is whether the ordination clause is beneficial to the subordinator in any stantially greater or different degree than the provisions in other cases are beneficial to the party resisting specific orcement.[17/] The answer to this must be in the negative - in t, as Appellant has pointed out (Opening Brief 29), the con- se is true.

It is appropriate to note that all of the evidence ilable to the court below in making its decision showed that subordination clause was asked for and insisted upon only by ellant. For example, in the deposition of Mr. Ching, who

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[17/] Of course, many of these cases involve, like this one, a sit- ion whereby one party is trying to avoid a contract by refusing perform a part of it and utilizing that as a basis for being ex- ed from the rest. The courts and writers have recognized this one of the factors mitigating against allowing such a party to ceed. See, e.g., Morris v. Ballard 16 F.2d 175, 176 (D.C.Cir. 6), Wesley N. Taylor Co. v. Russell, 194 Cal. App. 2d 816, 15 .. Rptr. 357, 365; Fry on Specific Performance of Contracts, . 830 (3d ed. 1884).

Appellees state, was acting as Appellant's attorney, he stated
er questioning by Appellees' attorney that the subordination
use was requested by Appellant and Appellant alone, and that
eed Appellant insisted the provision would be necessary if it
e to obtain financing (Ching Deposition 27-28). Mr. Ching was
o asked whether restrictions on the degree of subordination had
n agreed to. Mr. Ching answered in the negative, stating that
agreement was "that this would be a full, you know, complete
ordination of their fee interest, period." (Ching Deposition
. Even the explanation made by Mr. Ching to the Appellees of
t a subordination clause was all about during the negotiations
candidly and forthrightly to the effect that such a clause was
to the benefit of lessors and all to the potential detriment
the lessees. (Ching Deposition 32; See also Low Deposition 10,
12). There is no indication anywhere in the depositions or
er material before the court below (other than the self-serving
tements of Appellees on their interrogatory answers) that there
any intention that the subordination provisions should benefit
Appellees or that they expected or bargained for any benefit
refrom.

How then do Appellees answer Appellant's analysis of
nature and effect of a subordination provision and conclusion
t it could not be mutually beneficial? They cite no authority;
y give no analysis and indeed, even fail to take issue with

rmitted involved a far more plausible and realistic "benefit"
the resisting party than anything the Appellees could assert
re. Indeed, Appellees do little more than assert that "it is
vious that the Appellees contemplated that they would receive
benefit by having a completed structure on their premises...."
ppellees' Brief 37). There is not even a hint why this should
'bbvious" even though all available evidence is to the contrary.
ther is there any explanation of why, if Appellees were primari-
interested in the type of building to be constructed, that
ter was not covered in the option. Further, both Mr. Ching
l Mr. Low state in their depositions that although buildings
re mentioned by the parties in their negotiations, the Appellees
ght to impose no restrictions or minimum requirement upon the
ssees. Rather, Mr. Ching reported that "from the discussions,
e lessee would have complete control of it". (Ching deposition
; See Low deposition 15).

Appellees suggest that Appellant offered in its brief
n effect, to negotiate the terms of the subordination provision
ch the Appellees...." (Appellees' Brief 38). Appellant never
fered to "negotiate" in its brief;[18/] its position was made

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18/ Appellant's statement was: "If Appellees wish, the Appellant
ll be happy to alter its offer to waive the subordination pro-
sion by offering to waive only so much thereof as Appellees de-
re; the Appellees may then subordinate their fee simple interest
much as they wish." (Opening Brief 31).

rfectly clear and has not been refuted. Appellees have refused perform their obligations under a contract, the terms of which re bargained for, and substantial consideration for which was id. (R. 8-9). They then utilized their own unwillingness as a sis for asking this court to excuse them from performance of l their other obligations under that contract, notwithstanding ellant's willingness to perform fully and completely all its ligations thereunder. Appellees in one breath refuse to execute subordination agreement and in the next refuse to execute a se without a subordination agreement because subordination is neficial to them. If it is true that some benefit accrues to ellees from a subordination provision, then Appellant is lling to accept a degree of specific enforcement of the option nting Appellant a lease containing a subordination provision ich contains only such subordination provisions as are beneficial Appellees - in short, Appellant will waive all benefit it is receive under the said clause but will permit Appellees to tain all benefit which they alleged they will receive thereunder. rely the offer of waiver in this form eliminates any distinction at might be drawn between this case and the myriad others in-lving waiver on the ground this case involves a provision with nefits accruing to both sides; further, it properly places upon ellees the burden of showing what this "benefit" is that they

not wish to give up.[19]

III. The third issue is whether Appellant, if not entitled specific performance, is not then entitled to damages arising of Appellees' refusal to perform. Appellant believes Appellees' ef fails to meet the discussion and authorities given in its ning brief and will therefor make no further reply here.

IV. There is a final issue presented in this case: Did lower court err in cancelling Appellant's Motion of Lis Pendens?

The lower court apparently shares a not uncommon confusion to the distinction between lis pendens and a notice of lis pendens. former is a doctrine which provides that a purchaser who ac- res an interest in property that is involved in pending litiga- n stands in the same position as his vendor.[20] The underlying ory of this ancient doctrine is that once a controversy has n subjected to the jurisdiction of the courts it should be im- sible for any of the parties to interfere with consummation of courts' judgment. The doctrine itself has not been altered

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There is and can be no real question that the subordination use was intended to and does in fact benefit only the Appellant. must be borne in mind that the question is whether the Appellees ld be better off with no subordination than with some - and the den is upon them to show that some degree of subordination of ir fee simple interest is more beneficial to them than no sub- ination whatever. The mere fact that there is a risk they will e their interest in the former case and no such risk in the ter case precludes any such showing.

34 Am. Jur. Lis Pendens Sec. 2.

statute in Hawaii.

At common law all purchasers of property were deemed have constructive notice of litigation affecting title to such perty. Hawaii has altered this common law rule for actions the state courts by requiring that a notice of such litiga- n (i.e., Notice of Lis Pendens) be filed in the Bureau of veyances and/or with the Assistant Registrar of the Land rt. [21]

If Appellees are correct in their conclusion that the aii statute [22] does not "require" the recording of a notice of Pendens for actions pending in Federal Courts, and that there- 28 USC Sec. 1964 does not apply to this action, they have ely established that the doctrine of lis pendens will apply any purchaser of the land even though no notice of lis pendens filed. [23] If this is the case, then the existence of Appellant's ice of Lis Pendens was an irrelevance; it created no obstacle anyone and provided in itself no cloud upon Appellees' d. In this circumstance there was no one whose interest had may have become affected by the existence of the notice,

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RLH Secs. 230-42, 342-78.

RLH Secs. 230-42; no mention seems to be made of the compar- e statutory provision for land under the jurisdiction of the d Court, RLH Secs. 342-78.

King v. Davis, 137 Fed. 222 (Va. Cir. 1905).

luding the Appellees, and thus no "actual and antagonistic
ertion of right".[24/] In short, the district court had no juris-
tion to cancel the lis pendens since it could not do so within
framework of a "case or controversy".

If, on the other hand, Appellees' conclusion is incor-
t and if a notice of lis pendens is required in Hawaii for
ions in Federal as well as State courts, then the reasoning
authorities given in Appellant's opening brief stand unanswered
Appellees and establish that the cancellation was in error.

I certify that, in connection with the preparation of
s brief, I have examined Rules 18 and 19 of the United States
rt of Appeals for the Ninth Circuit, and that, in my opinion,
foregoing brief is in full compliance with those rules.

Richard P. Schulze, Jr.
Attorney for the Appellant

24/ U. S. v. Johnson, 319 US 307, 87. L.Ed.1413 (1943).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

E LAHAINA-MAUI CORPORATION,
California corporation,

Appellant,

v. No. 20419

SEPH TAU TET HEW and HELEN
ONA HEW, husband and wife,
ORGE TAN and SHIZUKO RUTH
N, husband and wife,

Appellees.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 1965, caused to be mailed (First Class Mail) in the U. S. Post fice at Honolulu, Hawaii, postage thereon fully prepaid, three pies of the foregoing brief of the above named Appellant, THE AINA-MAUI CORPORATION, addressed to Mr. William M. Swope, Smith, d, Beebe & Cades, First National Bank Building, Honolulu, Hawaii.

DATED at Honolulu, Hawaii, this 29th day of December, 5.

RICHARD P. SCHULZE, JR.